

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT LICENSE NO. 44331
Issued to: William E. ROGERS

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2259

William E. ROGERS

This appeal has been taken in accordance with Title 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 12 December 1980, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri, suspended Appellant's license for one month on twelve months' probation, upon finding him guilty of negligence. The specification found proved alleged that while serving as operator on board M/V CITY OF PITTSBURGH under authority of the license above captioned, on or about 1 October 1980, Appellant failed to maintain a proper watch on river conditions, which contributed to the grounding of tank barge AO-98 due to falling river conditions.

The hearing was held at Louisville, Kentucky, on 19 November 1980.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of two witnesses and seven documents.

In defense, Appellant offered in evidence his own testimony and the testimony of another witness.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then entered an order suspending all documents issued to Appellant for a period of one month on twelve months' probation.

The entire decision was served on 29 December 1980. Appeal was timely filed on 14 January 1981 and perfected on 29 April 1981.

FINDINGS OF FACT

On 1 October 1980, Appellant was serving as operator on board

M/V CITY OF PITTSBURGH and acting under authority of the above captioned licensed while the vessel was moored at mile 608, Ohio River.

In view of the discussion, infra, and disposition of this appeal, extensive findings of fact are unnecessary.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that there was no substantial evidence to support the finding of negligence for failure to use a fathometer while the vessel was moored, and a presumption of negligence based on the grounding of the vessel was improperly applied against Appellant.

APPEARANCE: Barnett & Alagia, of Louisville, Kentucky, by Mr. W. David Kiser, Esq.

OPINION

Upon the Investigating Officer resting his case (R-85), Appellant moved to dismiss the charge. It is clear from the record (R-88, 96-97), that the Administrative Law Judge relied upon the presumption of negligence arising from the grounding of a vessel in denying the motion to dismiss. It is also manifest that the Administrative Law Judge determined that the grounding of barge AO-98 was discovered at 0900 on 1 October 1980, some three hours after Appellant was relieved as the operator on watch.

The operator of an uninspected towboat cannot be held liable for the general safety of the vessel when he is not on watch. Decision on Appeal No. 2153. In this regard he is unlike the master of a vessel. Decision on Appeal No. 928. In this case the vessel was moored and under the control of another operator at the time the grounding was discovered. Since the time of grounding was never adequately established, the presumption of negligence resulting from a grounding was improperly applied in denying Appellant's motion to dismiss the charge after the Investigating Officer rested his case. A presumption of negligence arises against the person in charge of a vessel under certain circumstances, e.g. when it allides with, or grounds on, a charted object. Several factors are essential to the rationale underlying the presumption; among these are actual control of the vessel at the time of the incident. In the present case, not an iota of evidence is in the record to suggest the actual time of grounding of the vessel. Since the grounding was discovered three hours after Appellant's watch, the lapse of time and failure to demonstrate control defeat the application of the presumption

against this Appellant to establish a prima facie case. This is not to say that negligence could not have caused or contributed to the grounding, merely that the Investigating Officer was required to make his case without the aid of the presumption.

Only by the introduction of evidence establishing the proper standard of care, and Appellant's failure to conduct himself in compliance with the appropriate standard of care, could the Investigating Officer have established a prima facie case. The evidence indicated that the standard practice on the river was for vessel operator's to rely on the gauge readings from the lock master, as relayed via radiotelephone, to determine the depth of the water below McAlpine Locks and Dam. The practical difficulty of judging a fall of water in a river is a persuasive argument attesting to the reasonableness of operators relying on a lock tender for this information.

There was no evidence presented to establish the standard of care concerning the use of a fathometer by an operator while his vessel is moored. Appellant's admission that he did not use the vessel fathometer during his watch could only establish negligence if use of the fathometer was required in the exercise of due care by a prudent navigator in the same circumstances. See Decisions on Appeal Nos. 2100 and 2080.

The evidence more nearly establishes that monitoring the radio for gauge readings from the lock master was the exercise of due care under the circumstances. In addition, the testimony of Appellant indicates that the fathometer was of dubious value to a moored vessel in relatively shallow waters. The failure of the Investigating Officer to establish a contrary standard of care, and to demonstrate Appellant's failure to abide by the appropriate standard preclude a finding of negligence based on a failure to employ the fathometer.

CONCLUSION

It is apparent from the foregoing discussion that the finding of proved cannot be sustained and that the charge should be dismissed, with prejudice.

ORDER

The order of the Administrative Law Judge, dated at St. Louis, Missouri, on 12 December 1980, is VACATED. The charge is DISMISSED.

R. H. SCARBOROUGH
VICE ADMIRAL, U. S. COAST GUARD

Vice Commandant

Signed at Washington, D.C. this 29th day of July 1981.